Minister for Human Resources v Thong Chin Yoong and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-01-195 OF 1996 AND W-02-400 OF 1996
SHAIK DAUD, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
7 JULY 1999

Labour Law *— Industrial Court — Discretion of Minister — Minister's discretion to refer workman's representations to Industrial Court — Issue whether employee was constructively dismissed is a question of law — Whether province of Minister to decide — Whether Industrial Court the best venue to decide*

The respondent — who at the material time was employed by Berjaya Industrial Bhd ('the company') — was suspended by the company upon a purported allegation of gross and serious misconduct. After a series of correspondence, and the ultimatum given by the respondent was not met, the respondent wrote to the company and considered himself to have been constructively dismissed. The respondent made representation to the Director of Industrial Relations on the ground that he was dismissed without just cause or excuse by the company. The Minister of Human Resources ('the Minister') decided that his representation was not fit and proper to be referred to the Industrial Court without alluding to any reasons thereof. The respondent's application for an order of certiorari and mandamus quashing the order of the Minister was allowed by the High Court. Counsel for the company contended that the learned judge erred in law when he issued the order of certiorari and mandamus on the ground that the terms and conditions of the employment do not provide for a suspension.

Held, dismissing the appeal:

Whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide. The Industrial Court is the best venue to decide this question. In the proper exercise of his discretion, the Minister ought to have referred the respondent's representation to the Industrial Court to decide on its merits. Therefore, the Minister had failed to fully appreciate the scope of his discretion under s 20(3) of the Act, when he declined to refer to the Industrial Court (see p 261A–B).

[Bahasa Malaysia summary

Responden — yang pada masa yang material adalah digaji oleh Berjaya Industrial Bhd ('syarikat tersebut') — telah digantung oleh syarikat tersebut atas suatu pengataan salah laku melampau dan serius. Selepas suatu siri surat-menyurat, dan kata dua yang diberi oleh responden tidak dipenuhi, responden menulis kepada syarikat tersebut dan menganggap dirinya telah dipecat secara konstruktif.

Responden membuat representasi kepada Pengarah Perhubungan Perusahaan atas alasan bahawa beliau telah dipecat tanpa sebab atau alasan adil oleh syarikat tersebut. Menteri Sumber Manusia ('Menteri tersebut') memutuskan bahawa representasi beliau adalah tidak sesuai dan wajar dirujuk kepada Mahkamah Perusahaan tanpa menyebut apa-apa alasan-alasan. Permohonan oleh responden untuk perintah certiorari dan mandamus untuk membatalkan perintah Menteri tersebut dibenarkan oleh Mahkamah Tinggi. Peguam kepada syarikat tersebut menegaskan bahawa hakim yang arif membuat kesilapan di bawah undang-undang apabila beliau mengeluarkan perintah certiorari dan mandamus atas alasan bahawa terma-terma dan syarat-syarat pekerjaan tidak memperuntukkan untuk penggantungan.

Diputuskan, menolak rayuan:

Sama ada atau tidak seorang pekerja adalah dipecat secara konstruktif adalah persoalan undang-undang yang bukan dalam bidang kuasa Menteri untuk memutuskan. Mahkamah Perusahaan adalah tempat yang terbaik untuk memutuskan persoalan ini. Dalam pelaksanaan budi bicara beliau yang betul, Menteri tersebut seharusnya merujuk representasi responden kepada Mahkamah Perusahaan untuk memutuskan atas merit-meritnya. Oleh itu, Menteri tersebut telah gagal untuk menyedari sepenuhnya skop budi bicara beliau di bawah s 20(3) Akta tersebut, apabila beliau enggan merujuk kepada Mahkamah Perusahaan (lihat ms 261A–B).]

Notes

For cases on discretion of the Minister, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 938–939.

Cases referred to

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 1 MLJ 9 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20, (1), (3)

Appeal from: Originating Motion No R2–25–20 of 1995 (High Court, Kuala Lumpur)

Asmabi Mohamad (Senior Federal Counsel) for the appellant in Civil Appeal No W–01–195 of 1996.

V Sivaparanjothi (*V Siva & Partners*) for the appellant in Civil Appeal No W–02–400 of 1996.

LG Seah (*Lobo & Associates*) for the respondent.

Shaik Daud JCA (delivering judgment of the court): These two appeals emanate from the High Court issuing an order of certiorari quashing the order of the Minister of Human Resources who refused to refer the

A respondent's application to the Industrial Court and an order of mandamus directing the Minister to exercise his discretion under s 20(3) of the Industrial Relations Act 1967 ('the Act') to refer the matter to the Industrial Court.

The facts of the matter is that respondent was employed by Berjaya B Industrial Bhd ('the company') on 16 August 1988 as the manager of its hotel and resort. The respondent served the company for $5^1/_2$ years and his last post was Vice President and General Manager Hotel and Resorts. This was a re-designated post with effect from 1 January 1994. The duties and functions remained the same as before the re-designation.

On 30 March 1994, the company suspended the respondent but C without any loss of emoluments, benefits and other perks, upon a purported allegation of gross and serious misconduct which the company alleged they were investigating. The notice of suspension did not spell out the alleged misconduct but merely stated that it had been alleged that the respondent had committed various acts of misconduct. About 20 days later when D nothing transpired, the respondent wrote a letter to the company dated 21 April 1994 requesting that he be informed of his position by 28 April 1994. The company replied by a letter dated 25 April 1994 that the investigation was still pending and this time added that the suspension with full pay will continue until the investigation was completed. Then by a letter dated 26 April 1994, the respondent wrote that it was clear that the E company did not have any material justifying the sudden suspension and that the prolonged investigation confirmed this. He also gave notice that if the suspension was not lifted and he be reverted to his old job in the company on or before 4 May 1994, he considered himself dismissed by the company with effect from that date. The company replied by letter dated 3 May 1994 denying the respondent's allegation and that the nature of the F allegations were such that it required in depth and prolonged investigation, and that the investigation was still in progress and the suspension should continue.

Since the ultimatum given by the respondent was not met by 4 May 1994, and since there is no provision for a suspension in his contract G of service, he considered himself to have been constructively dismissed with effect from 4 May 1994, and he said so in his letter to the company dated 3 May 1994.

Thereafter, the respondent made representation to the Director of Industrial Relations vide letter dated 10 May 1994, under s 20(1) of the Act on the ground that he was dismissed without just cause or excuse by the H company. Then by a letter dated 21 January 1995, the respondent was informed that the Minister of Human Resources had decided under s 20(3) of the Act, that his representation was not fit and proper to be referred to the Industrial Court without alluding to any reasons thereof. This prompted the respondent to file the application for an order of certiorari and I mandamus in the High Court.

Dato' V Sivaparanjothi for Berjaya Industrial Bhd contended that the learned judge erred in law when he issued the order of certiorari and mandamus on the ground that the terms and conditions of the employment

do not provide for a suspension and therefore the Minister ought to refer the matter to the Industrial Court. It is common ground that there was no suspension clause in the terms and condition of the respondent's employment. In spite of this, it was argued that provisions of suspension is always implied in every contract of employment. A

Senior federal counsel Asmabi Mohamad representing the Minister of Human Resources was of similar view. B

First and foremost, we should make it clear that we are here not hearing this appeal on its merits since the matter was never decided by the Industrial Court. Therefore, whether the suspension was justified or not or whether such a suspension amounted to constructive dismissal or not, is not for us to decide in this appeal. What we have to decide is whether the Minister was justified in refusing to refer the matter to the Industrial Court. C

With respect, we find that nowhere did the learned judge hold that since the contract of employment did not provide for a suspension, the minister ought to refer the matter to the Industrial Court. After careful study of the learned judge's judgment, which is in Bahasa Malaysia, we find that what he held was that since the respondent complained that as there was no suspension clause in his contract of service, and since there was no reasons given by the Minister as to why he thought it was not a fit and proper case to be referred to the Industrial Court, the learned judge was of the view that the respondent's complaint of being constructively dismissed by the appellant was, in the circumstances, a genuine complaint and not frivolous or vexatious. The learned judge also held that the question of constructively being dismissed, being a question of law, the proper forum to decide on this is the Industrial Court after a full hearing. Similarly, with the question of whether the appellant has the power to suspend the respondent during the period of investigations of the alleged abuses, since there was no such express clause in the contract of employment. The learned judge came to the conclusion that all these questions are best decided by the Industrial Court. In the light of that, we are in full agreement with the learned judge's findings. D E F

While it is not disputed that the legislature never intended that the Minister refer every representation by an employee to the Industrial Court, the Minister has been given a discretion to decide and he ought to exercise that discretion properly. In *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 1 MLJ 9, the Supreme Court had the occasion to consider this discretion. That court held that: G

> The minister had a discretion under s 20(3) of the Act and that is not in dispute. The issue is whether the discretion is unfettered. To say it is an unfettered discretion is a contradiction in terms. Unfettered discretion is another name for arbitrariness. H
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> The Minister's discretion under s 20(3) is wide, but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court, unless he had misdirected himself in law or had taken into consideration relevant matters or that his decision militates against the object of the statute. I

A Otherwise, he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious ... .

Whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide and we feel that the Minister is not competent to decide and the Industrial Court is the best B venue to decide this question. In the proper exercise of his discretion, the Minister ought to have referred the respondent's representation to the Industrial Court to decide on its merits. Therefore, we are equally of the view that the Minister failed to fully appreciate the scope of his discretion under s 20(3) of the Act, when he declined to refer to the Industrial Court. We are of the view that the learned judge rightly allowed the respondent's C application. In the circumstances, we dismissed both appeals with costs and ordered the deposits to go to account of taxed costs.

Appeals dismissed.

Reported by Loo Lai Mee

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